Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

ROLAND C. BRASWELL,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the prosecution's announcement to the grand jury of the witness' anticipated perjury and its invitation to the grand jurors to facilitate that perjury and thus participate in its commission, is a species of prosecutorial misconduct that may be remedied by dismissing an indictment..

A. The right to a fair and impartial grand jury is a fundamental constitutional right, the abrogation of which warrants dismissal of an indictment.

B. In addition to constitutional grounds, the court's supervisory powers may nonetheless be invoked to dismiss indictments based upon prosecutorial misconduct where that misconduct is of constitutional proportions.

STATEMENT OF PARTIES

The parties in the United States District Court were the United States of America versus Roland C. Braswell, Defendant. On appeal to the Fourth Circuit Court of Appeals the parties were the United States of America, Plaintiff-Appellant versus Roland C. Braswell, Defendant-Appellee (No. 93-5770) and the United States of America, Plaintiff-Appellee versus Roland C. Braswell, Defendant-Appellant (No. 93-5813). There has been no change in identity of the parties.

The parties to the within petition are the United States of America, Appellee versus Roland C. Braswell, Defendant-Appellant.

TABLE OF CONTENTS

SUBJECT INDEX

Question Presented i
Statement of Parties ii
Table of Contents iii
Table of Authorities v
Face Page 1
Opinion Below 2
Jurisdiction 2
Constitutional Provisions 2
Statement of Case 3
Reasons for Granting Writ 7
Argument 8
Conclusion 25

APPENDIX INDEX

EXHIBIT A February 8, 1995 Unpublished Decision of the Fourth Circuit Court of Appeals reinstating perjury convictions and remanding for resentencing 1a

EXHIBIT B Decision of the District Court granting Motion for Judgment of Acquittal on perjury counts 10a

EXHIBIT C March 7, 1995 decision of Fourth Circuit Court of Appeals denying petition for rehearing and suggestion for rehearing in banc 15a

EXHIBIT D Fifth Amendment to the United States 17a

EXHIBIT E Notice of Appeal of reinstated perjury convictions and resentence 18a

TABLE OF AUTHORITIES

CASES

Arizona v. Fulminante,
499 U.S. 279, 111 S. Ct. 1246,
113 L. Ed 2d 302 (1991) reh. denied 500 U.S. 938,
111 S. Ct. 2067, 114 L. Ed. 2d 472 (1991) 12

Ballard v. United States, 329 U.S. 187, 67 S. Ct. 261,
91 L. Ed. 181 (1946) 11, 12

Bank of Nova Scotia v. United States, 487 U.S. 250,
108 S. Ct. 2369,
101 L. Ed. 2d 228 (1988) 10, 11, 13, 14, 20-23

Berger v. United States, 295 U.S. 78, 55 S. Ct. 629,
79 L. Ed. 134 (1935) 24

Branzburg v. Hayes, 409 U.S. 665, 92 S. Ct. 2646,
33 L. Ed. 2d 626 (1972) 16

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824,
17 L.Ed. 2d 705 (1967) 18

Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370,
50 L. Ed. 652 (1906) 15

In Re Walsh, 623 F. 2d 489 (7th Cir. 1980) 15

Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L.
Ed. 2d 460 (1986) 11

United States v. Antonelli Fireworks Co., 155 F. 2d 631 (CA2) cert. denied 329 U.S. 742, 67 S. Ct. 49, 91 L. Ed. 640 (1946) 18

United States v. Borello, 766 F. 2d 46 (CA2 1985) . . 18

United States v. Burns, 990 F. 2d 1426 (4th Cir. 1993) cert. denied ___ U.S. ___, 113 S. Ct. 2949, 124 L. Ed. 2d 696 (1993) 21

United States v. Calandra, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) 15, 19

United States v. Chanen, 549 F. 2d 1306 (9th Cir.) cert. denied 434 U.S. 825, 98 S. Ct. 72, 54 L. Ed. 2d 83 (1977) 17

United States v. Ciambrone, 601 F. 2d 616 (2nd Cir. 1979) 16

United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal. 1975) aff'd. on other grounds 550 F. 2d 1224 (9th Cir.) cert. denied 434 U.S. 827, 98 S. Ct. 105, 54 L. Ed. 2d 85 (1977) 17

United States v. Isgro, 974 F. 2d 1091 (9th Cir. 1992) cert. denied 113 S. Ct. 1581, 123 L. Ed. 2d 148 (1992) 8

United States v. Lamantia, 856 F. Supp. 424 (N.D., E.D. Ill. 1994) 14

United States v. Larrazolo, 869 F. 2d 1354 (9th Cir. 1989) 8

United States v. Leverage Funding Systems, Inc., 637 F. 2d 645 (9th Cir. 1980) 17

United States v. Mara, 411 U.S. 19 . . . . . 6, 10

United States v. Martin, 480 F. Supp 880 (S. D. Tex. 1979) 16

United States v. McKenzie, 524 F. Supp. 186 (E. D. La. 1981) 16

United States v. Mechanik, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986) 18, 22, 23

United States v. Mills, 995 F. 2d 480 (4th Cir. 1993) cert. denied ___ U.S. ___, 114 S. Ct. 283, 126 L. Ed. 2d 233 (1993) 22

United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977) 17

United States v. Samango, 607 F. 2d 877 (9th Cir. 1979) 16

United States v. Udziela, 671 F. 2d 995 (7th Cir.) cert. denied 457 U.S. 1135, 102 S. Ct. 2964, 73 L. Ed. 2d 1353 (1983) 17

United States v. Williams, 504 U.S. 36, 112 S. Ct. 1735, 118 L.Ed. 2d 352 (1992) 6, 10, 19, 21

United States v. Wells, 163 F. 313 (D. Idaho 1908) . . 17

United States v. Zarattini, 552 F. 2d 753 (7th Cir. 1977) cert. denied 431 U.S. 942, 97 S. Ct. 2661, 53 L. Ed. 2d 262 (1978) 16

Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) 11

Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962) 15

CONSTITUTIONAL PROVISIONS

U.S. CONST., amendment V 15

MISCELLANEOUS SOURCES

Sara S. Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433 (1984) 21

Holdeman, Preindictment Prosecutorial Conduct in the Federal System, 71 J. Crim. L. & C., (1980) 16

Kaufman, The Grand Jury and Its Role and Its Powers, 17 F.R.D. 331 (1955) 15

B.J. Moore, Federal Practice, (2nd ed. 1981) 16

Note: Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence, 38 Wash. & Lee L. Rev. 110 (1981) 20

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

UNITED STATES OF AMERICA
Appellee

vs.

ROLAND C. BRASWELL
Appellant

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Roland C. Braswell prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on February 8, 1995. Petition for Rehearing and Suggestion for Rehearing in Banc were denied by order dated and entered March 7, 1995.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit was issued in an Unpublished Per Curiam opinion dated February 8, 1995 and entered on the 8th day of February, 1995. A copy of this opinion is included in the APPENDIX hereto as EXHIBIT "A".

The opinion of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing and suggestion for rehearing in banc was dated and filed March 7, 1995. A copy of this decision is included in the APPENDIX hereto as EXHIBIT "C".

The District Court's decision granting the motion to dismiss the perjury counts of the indictment appears in the APPENDIX hereto as EXHIBIT "B".

JURISDICTION

Jurisdiction in this cause is premised upon Title 28 USC Section 1254(1) for review, by certiorari, of the Judgment and opinion of the United States Court of Appeals for the Fourth Circuit. A written Per Curiam Opinion was dated by that court on the 8th day of February, 1995 and entered on the 8th day of February, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the United States Constitution are set forth in the APPENDIX hereto as EXHIBIT "D".

STATEMENT OF THE CASE

Roland C. Braswell, an attorney, was investigated by the Internal Revenue Service and was accused of helping his clients conceal profits from illegal drug trafficking activity. He was indicted for Conspiracy to Impede the Collection of Income Taxes (Klein Conspiracy) and for two counts of Perjury. This indictment formed the basis for federal jurisdiction in the court of first instance. The perjury charge from which this appeal arises stems from Mr. Braswell's testimony before a federal grand jury on August 19, 1992. On that date, and prior to the testimony of Mr. Braswell, the Assistant United States Attorney was guiding Special Agent Terrance O'Brien of the Internal Revenue Service through his testimony. At 10:05 a.m., immediately prior to taking a five (5) minute break, the following occurred:

> "PROSECUTRIX: Okay, do you want to go now to the - to the sale of the farm then we'll go into Mr. Braswell's explanations for all of this?
>
> FOREPERSON: Excuse me. Do we need to take a break?
>
> PROSECUTRIX: Let me ask you one-
>
> FOREPERSON: Yeah.
>
> PROSECUTRIX: -One thing. Mr. Braswell - we've invited him to appear in front of the jury. So right now he may be outside with his attorney, so I'd ask you not to make any comments about any of this

> because we anticipate that Mr. Braswell may perjure himself in front of you, and I want him to - us to have a very friendly atmosphere so that he feels very at ease in giving his explanations for this type of thing. And then we may - we're going to have another witness come in later with some other information. Is there anything you want to say about that - so I'd ask you please not say a word, because I anticipate they'd be out there right now."
> [Ct. of Appeals Appx. II, page 61].

At 11:16 a.m. on August 19, 1992, the defendant, Roland Braswell, voluntarily appeared before the grand jury immediately after agent O'Brien completed his testimony. Statements made by Mr. Braswell during his testimony led to charges of perjury.[1]

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[1] Two former clients of attorney Braswell, Canady and Riggs, had been convicted of drug trafficking crimes and had subsequently become government witnesses. Based upon information supplied by them, Braswell stood accused of helping his former clients conceal the profits from their illegal drug trafficking activities through the use of sham corporations and other devices.

The perjury charges stemmed from Braswell's testimony before the grand jury about documents purporting to be the corporate records of corporations he had established for Canady and Riggs, which records were voluntarily produced by Braswell.

After repeated questioning as to the date on which the documents were prepared, the government presented witnesses who testified that the documents were recent fabrications based upon the date of the manufacture of the paper and indentation analysis.

Braswell was indicted on 16 counts. Count One charged conspiracy to defraud the United States by impeding the collection of taxes. Counts Two through Seven charged the misdemeanor crime of willful failure to file tax returns. Counts Eight through Fifteen each

Defendant was convicted of one count of the Klein Conspiracy and two counts of Perjury.

After trial defense counsel made a motion for judgment of acquittal on the conspiracy and two perjury convictions. [Ct. of Appeals Appx. I, page 197]. The basis for the motion was misconduct of the prosecutrix before the grand jury and the influence of that misconduct on the grand jury. The District Court granted the motion as to the two perjury convictions but denied it as to the Conspiracy conviction. [Ct. of Appeals Appx. I, page 243]. Mr. Braswell appealed the failure of the District Court to dismiss all the indictment counts and the government cross-appealed the District Court's granting of acquittal on the two perjury convictions.

The District Court's order granting acquittal contained the following language:

> "The Court finds that under the circumstances of this case the prosecutor's statements to the grand jury were such a prejudicial character that the indictments on the perjury charges should be dismissed and judgment of acquittal should be entered on

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charged perjury for statements before the grand jury. Count Sixteen charged the crime of aiding or assisting the filing of a false tax return.

Braswell pleaded guilty to the six misdemeanor charges (Counts Two through Seven). The trial on the remaining counts proceeded. At the close of the government's case the defendant moved for judgment of acquittal. The motion was granted in part and Counts Nine through Fourteen were dismissed (6 of the 8 perjury counts) as duplicative. Braswell was found guilty of Counts One, Eight and Fifteen (the Klein conspiracy and the two remaining perjury counts) and acquitted of Count Sixteen.

those charges. The statements by the prosecutor telling the grand jury that they could expect the defendant, who was then only a witness and either a subject or a target before the grand jury, to commit perjury when he later came before them was an unnecessary and prejudicial suggestion to the grand jury which should not be allowed. In addition, the prosecutor's invitation to the grand jury to expect the defendant's perjury and therefore to make him feel comfortable and at ease thereby facilitating the perjury, invited the grand jury to become involved in the prosecution's activities and should not be allowed. A grand jury just as a trial jury, should be neutral, impartial, and uncommitted to either side during the case. *United States v. Williams*, 112 S. Ct. 1735, 1742 (1992). It would be fundamentally unfair for grand jurors to become participants in the investigation or prosecution of a crime. In so doing, they would lose their neutrality and would invite abuse. *Untied States v. Mara*, 411 U.S. 19, 29 (1973) (Douglas, J., dissenting)" [APPENDIX EXHIBIT "C"] [Ct. of Appeals Appx. I, page 246-247].

On February 8, 1995, the Court of Appeals for the Fourth Circuit issued its decision in which it affirmed the defendant's conviction on the Klein conspiracy (remanding for resentencing) and reinstated the two perjury counts [APPENDIX EXHIBIT "A"]. The Court of Appeals remanded the case for resentencing on all counts with instructions that the District Court make findings of fact

as to whether defendant is subject to sentencing under the Guidelines. Defendant's subsequent motion for rehearing and suggestion for rehearing in banc were denied by order dated March 7, 1995 [APPENDIX EXHIBIT "B"].

Defendant is currently appealing to the Fourth Circuit Court of Appeals both the perjury conviction as reinstated as well as the resentence on remand. [APPENDIX EXHIBIT "E"].

REASONING RELIED ON FOR ALLOWANCE OF THE WRIT

It is respectfully submitted that the Fourth Circuit Court of Appeals has decided the federal question raised herein in a way which far departs from the accepted and usual course of judicial proceedings and in conflict with the decisions of the United States Supreme Court, requiring clarification by this Court of the source of and limitations on the power to dismiss indictments.

ARGUMENT

THE PROSECUTION'S ANNOUNCEMENT TO THE GRAND JURY OF THE WITNESS' ANTICIPATED PERJURY AND ITS INVITATION TO THE GRAND JURORS TO FACILITATE THAT PERJURY AND THUS PARTICIPATE IN ITS COMMISSION, IS A SPECIES OF PROSECUTORIAL MISCONDUCT THAT MAY BE REMEDIED BY DISMISSING AN INDICTMENT.

A. The right to a fair and impartial grand jury is a fundamental constitutional right, the abrogation of which mandates dismissal of an indictment, rendering a harmless error inquiry inappropriate.

Federal courts draw their power to dismiss an indictment from two distinct sources. First, "a court may dismiss an indictment if it perceives constitutional error that interferes with the grand jury's independence and the integrity of the grand jury proceeding." *United States v. Isgro,* 974 F. 2d 1091 (9th Cir. 1992) cert. denied 113 S. Ct. 1581, 123 L. Ed. 2d 148 (1992).

Constitutional error is found where the "structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice to the defendant." *United States v. Larrazolo*, 869 F. 2d 1354, 1357-58 (9th Cir. 1989). Additionally, constitutional error may be found "if the independence of the grand jury is substantially infringed." *Id.* at 1358.

Second, a district court may draw upon its supervisory powers to dismiss an indictment. (See Point B, Infra).

It is submitted that the decision by the District Court Judge dismissing the perjury counts herein was manifestly correct (although it it further submitted that the entire indictment should have been dismissed) and that said dismissal was clearly based upon the former constitutionally granted authority. Assuming arguendo that this court finds the decision of the District Court was not based upon constitutional grounds it is urged in Point B, Infra, that the District Court was equally justified in exercising its supervisory powers to dismiss the instant indictment.

The District Court decision specifically articulated its finding that the grand jury was deprived of its neutrality:

> "The Court finds that under the circumstances of this case the prosecutor's statements to the grand jury were such a prejudicial character that the indictments on the perjury charges should be dismissed and judgment of acquittal should be entered on those charges. The statements by the prosecutor telling the grand jury that they could expect the defendant, who was then only a witness and either a subject or a target before the grand jury, to commit perjury when he later came before them was an unnecessary and prejudicial suggestion to the grand jury which should not be allowed. In addition, the prosecutor's invitation to

> the grand jury to expect the defendant's perjury and therefore to make him feel comfortable and at ease thereby facilitating the perjury, invited the grand jury to become involved in the prosecution's activities and should not be allowed. A grand jury just as a trial jury, should be neutral, impartial, and uncommitted to either side during the case. *United States v. Williams*, 112 S. Ct. 1735, 1742 (1992). It would be fundamentally unfair for grand jurors to become participants in the investigation or prosecution of a crime. In so doing, they would lose their neutrality and would invite abuse. *Untied States v. Mara*, 411 U.S. 19, 29 (1973) (Douglas, J., dissenting)" [APPENDIX EXHIBIT "B"] [Ct. of Appeals Appx. I, page 246-247].

In this case the District Court correctly dismissed the perjury counts when it found that the effect of the prosecutorial misconduct usurped the role of the grand jury thus violating the defendant's fundamental right to a fair proceeding.

Such a finding is supported by this Court's decision in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988) which holds the harmless error rule inapplicable to that "class of cases in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case, because the errors are deemed fundamental...(T)hese cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the

presumption of prejudice." *Id.* 487 U.S. 250, 256-257, 108 S. Ct. 2369, 2374. See *Rose v. Clark*, 478 U.S. 570, 577-578, 106 S. Ct. 3101, 3105-3106, 92 L. Ed. 2d 460 (1986).

Such defects of constitutional proportion are exemplified by *Vasquez v. Hillery,* 474 U.S. 254, 260-264, 106 S. Ct. 617, 621-624, 88 L. Ed. 2d 598 (1986) wherein racial discrimination in the selection of grand jurors was held to compel dismissal and *Ballard v. United States,* 329 U.S. 187, 67 S. Ct. 261, 91 L. Ed. 181 (1946) compelling a like result where women were excluded from the grand jury.

It is submitted that just such a situation is presented herein - that the egregious nature of the prosecutorial misconduct in this case allows a presumption that the defendant was prejudiced and any inquiry into harmless error would require unguided speculation.

While the Circuit Courts of Appeals seem to be in agreement that *Bank of Nova Scotia, supra,* is inapplicable to cases of constitutional proportions, there is no definition of what conduct might amount to the "appropriate case" for such treatment. By applying the *Bank of Nova Scotia, supra,* standard that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded" to every instance of prosecutorial misconduct, courts ignore the exception created by the Supreme Court in the application of that standard. *Id.* 487 U.S. at 255, 108 S. Ct. at 2373.

Indeed, the Supreme Court cautioned in *Bank of Nova Scotia, supra:*

[i]n the cases before us we do not inquire

> whether the grand jury's independence was infringed. Such an infringement may result in grave doubt as to a violation's effect on the grand jury's decision to indict...[w]e note that the Court of Appeals found that the prosecution's conduct was not 'a significant infringement on the grand jury's ability to exercise independent judgment' [citation omitted] and we accept that conclusion." *Id.* 487 U.S. at 268, 108 S. Ct. at 2376.

The Supreme Court recently addressed the distinction between fundamental error and simple rule violations in *Arizona v. Fulminante,* 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), reh. denied 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 472 (1991). The test articulated by the Court therein clarifies whether a violation of a criminal defendant's constitutional rights is so fundamental to our system of democracy that prejudice is presumed, or whether the violation merely requires analysis under the "harmless error" doctrine.

The *Fulminante, supra,* Court (examining whether admission into evidence of an involuntary confession required an automatic reversal or whether defendant had to show actual prejudice) noted the harmless error doctrine was not appropriate where structural defects in the administration of criminal justice were implicated. These errors of constitutional magnitude have been held to include the unlawful exclusion of members of a defendant's race and gender. See *Vasquez, supra* and *Ballard, supra.*

The difference is apparent in decisions where courts reviewed structural defects in the grand jury process

and ultimately dismissed those indictments. Indeed, the Court in *Vasquez, supra,* expanded on the necessity of dismissal of indictments in such a case, holding that invalid indictments cannot be cured by a subsequent error-free trial since the grand jury shapes the indictment and therefore substantially influences the way in which a case is put before a petit jury. *Id.* 474 U.S. at 263, 106 S. Ct. at 623.

It is submitted that this case has constitutional import that goes far beyond a mere breach of secrecy or violation of a rule of procedure.

The *Fulminante, supra,* formula is clearly distinguishable from the standard applied in *Bank of Nova Scotia, supra,* on which the Court of Appeals relied in the case at bar. In *Bank of Nova Scotia* a district court dismissed an indictment on the grounds that the prosecution had violated FRCP Rules 6(d) and (e) in putting a case before the grand jury. The Supreme Court found that Federal Rule of Criminal Procedure 52(a) applied to the prosecutorial misconduct at issue and that the district court did not have authority to dismiss the indictment absent a showing of prejudice to defendant. *Id.* 487 U.S. at 255, 108 S. Ct. at 2371.

The distinction between the facts in the instant case and in *Bank of Nova Scotia, supra,* is apparent. The errors treated in *Bank of Nova Scotia* did not arise from the grand jury itself, but concerned matters placed before the grand jury. There is a shocking and fundamental difference between the prosecutorial misconduct at issue in *Bank of Nova Scotia* and the indictment herein in which the grand jurors were importuned to abandon their role and join the prosecutrix in the facilitation of anticipated

perjury.

Prosecutorial misconduct concerning matters of evidence presented to a grand jury may be subjected to a harmless error doctrine under *Bank of Nova Scotia, supra.* A reviewing court is able to sort out the prosecutor's statements and determine if defendant has been prejudiced. Where, however, the misconduct goes beyond the evidence, and involves the grand jury itself in the misconduct, a reviewing court could never filter out or erase the taint that the conduct had on the grand jury's indictment.

In a similar vein, in *United States v. Lamantia,* 856 F. Supp. 424 (N.D., E.D., Ill. 1994) the District Court found that the harmless error doctrine was inapplicable to defendant's claim that the indictment should be dismissed due to a grand juror's conviction for contempt of court and bribery which caused a structural defect in the grand jury process.

It is respectfully submitted that the District Court's dismissal of the indictment herein was based upon fundamental constitutional grounds and did not represent a use of supervisory power. Accordingly, the Fourth Circuit Court of Appeals inappropriately applied the standard set forth in *Bank of Nova Scotia, supra* for the exercise of supervisory powers and failed to address the fundamental constitutional grounds relied upon by the trial court.

B. In addition to constitutional grounds, the district courts' supervisory powers may nonetheless be invoked to dismiss indictments based upon prosecutorial misconduct where that misconduct is of constitutional proportions.

To place the importance of the role of a fair and impartial grand jury in historical perspective, under the English rule of law where criminal prosecutions were instituted by the King at the behest of private prosecutors, "the most valuable function of the grand jury was not to examine into the commission of crimes, but to stand between the prosecutor and the accused and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." *Hale v. Henkel,* 201 U.S. 43, 59, 26 S. Ct. 370, 372, 50 L. Ed. 652 (1906). Accord, *Wood v. Georgia*, 370 U.S. 375, 390, 82 S. Ct. 1364, 1373, 8 L. Ed. 2d 569 (1962); *Kaufman, The Grand Jury and Its Role and Its Powers,* 17 F.R.D. 331, 335 (1955).

Indeed, the drafters of the United States Constitution placed great emphasis on this role when they elevated the grand jury to constitutional status, embodied in the Fifth Amendment command that no federal prosecution shall occur, "unless on a presentment or indictment of a grand jury." *U.S. Constitution, amendment V.* This Court has acknowledged that the framers thought the grand jury essential to preserve our basic liberties. See *United States v. Calandra,* 414 U.S. 338, 343, 94 S. Ct. 613, 617, 38 L. Ed. 2d 561 (1974). Thus, "the grand jury performs the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *In re Walsh*, 623 F. 2d 489, 492 (7th Cir.

1980) quoting *Branzburg v. Hayes,* 409 U.S. 665, 686-687, 92 S. Ct. 2646, 2659, 33 L. Ed. 2d 626 (1972). See also *United States v. Zarattini,* 552 F. 2d 753, 756 (7th Cir. 1977), cert. denied 431 U.S. 942, 97 S. Ct. 2661, 53 L. Ed. 2d 262 (1978).

Despite its status as an instrument of justice, as a practical matter the modern grand jury is greatly dependent on the United States Attorney "to present to it such evidence as it needs for its performance of its function and to furnish it with controlling legal principles." *United States v. Ciambrone*, 601 F. 2d 616, 622 (2nd Cir. 1979). See also *B. J. Moore, Federal Practice,* p. 6.02(1) (2d ed. 1981).

Recognizing this increasing dependency, federal courts were for some time sensitive to allegations of governmental misconduct before the grand jury and demonstrated willingness to curb prosecutorial abuse in those proceedings. See, generally, *Holdeman, Preindictment Prosecutorial Conduct in the Federal System,* 71 J. Crim. L. & C. 1, 16-19 (1980).

Thus in countless cases where over-zealous prosecutors manipulated a grand jury by wilfully misleading it or knowingly presented false evidence courts did not hesitate to exercise their power to dismiss indictments. See, e.g., *United States v. Samango,* 607 F. 2d 877 (9th Cir. 1979) (dismissed for failing to inform the grand jury of its authority to subpoena witnesses); *United States v. McKenzie,* 524 F. Supp. 186 (E.D. La. 1981) (dismissed where prosecutors placed undue pressure on grand jury to indict); *United States v. Martin,* 480 F. Supp. 880 (S.D. Tex. 1979) (dismissed for failure to reveal agreement not to prosecute to grand jurors); *United States*

v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977) (dismissed for questioning a witness outside the presence of the grand jury and then failing to inform the grand jury the testimony was exculpatory); *United States v. DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975) aff'd on other grounds 550 F. 2d 1224 (9th Cir.), cert. denied 434 U.S. 827, 98 S. Ct. 105, 54 L. Ed. 2d 85 (1977) (dismissed for failure to disclose vital information to the grand jury necessary to the grand jury's informed and independent judgment); *United States v. Wells*, 163 F. 313 (D. Idaho 1908) (dismissed where prosecutor expressed his opinion that defendants were guilty and that the grand jury should indict them).

As observed by the Seventh Circuit Court of Appeals in *United States v. Udziela*, 671 F. 2d 995 (7th Cir.) cert. denied 457 U.S. 1135, 102 S. Ct. 2964, 73 L. Ed. 2d 1353 (1982), these cases generally involved serious or blatant prosecutorial misconduct. "The dismissals in those decisions whether based on constitutional grounds or the federal courts supervisory powers, reflected the Court's fundamental concern for protecting the integrity of the judicial process, 'particularly the function of the grand jury from unfair or improper prosecutorial conduct.' *United States v. Chanen*, 549 F. 2d 1306, 1309 (9th Cir.) cert. denied 434 U.S. 825, 98 S. Ct. 72, 54 L. Ed. 2d 83 (1977)..." *Udziela, supra* at 998.

Strictly speaking the grand jury is a constitutional fixture in its own right, belonging to neither the executive nor the judicial branch, see *United States v. Leverage Funding Systems, Inc.*, 637 F. 2d 645, 649 (9th Cir. 1980), though it often relies on both when performing its duties. In light of the subtle yet distinct relationships among these three constitutionally authorized entities, courts have more

recently taken great care not to encroach on legitimate activities before the grand jury, making them extremely cautious in invalidating indictments for alleged grand jury misconduct of the prosecutor.

Despite this reluctance, the Supreme Court has recognized that the harmless error doctrine, denying a remedy in cases of clear prosecutorial misconduct "can work very unfair and mischievous results." *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The result we are left with today was foretold by Mr. Justice Marshall who warned "denying defendants relief for clear violations of their procedural rights 'reduces the law to pretend rules.' *United States v. Borello,* 766 F. 2d 46 (CA2 1985), quoting *United States v. Antonelli Fireworks Co.,* 155 F. 2d 631 (CA2) (Frank, J., dissenting), cert. denied, 329 U.S. 742, 67 S. Ct. 49, 91 L. Ed. 640 (1946); it means that prosecutors are free to engage in prohibited conduct subject only to 'purely ceremonial' words of appellate displeasure." *United States v. Mechanik,* 475 U.S. 66, 83, 106 S. Ct. 938, 948, 89 L. Ed. 2d 50 (1986) (Marshall, J., dissenting).

Nowhere is this result more clear than in the Court of Appeals decision in this case, which begins with the words "[t]his is a troubling case" and proceeds to take the office of the United States Attorney to task for its misconduct, expressing displeasure at the instant misconduct being added to that which might form a precedent for dismissal (in some other case) and then ordering the decision unpublished to deprive it of precedential value.

With each "look the other way" decision government attorneys have become bolder - pushing prosecutorial misconduct beyond its now non-discernible limits.

The Court is urged herein to establish those limits with greater precision and
to define the guidepost of defects of "constitutional proportion" so as to give the words the meaning intended.

> "We do not protect the integrity and independence of the grand jury by closing our eyes to the countless forms of prosecutorial misconduct that may occur inside the secrecy of the grand jury room. After all, the grand jury is not merely an investigatory body; it also serves as a 'protector of citizens against arbitrary and oppressive governmental action.' *United States v. Calandra, supra*, 414 U.S. at 343, 94 S. Ct. at 617...It blinks reality to say that the grand jury can adequately perform this important historic role if it is intentionally misled by the prosecutor - on whose knowledge of the law the jurors will, of necessity, rely." *United States v. Williams,* 504 U.S. 36, 112 S. Ct. 1735, 1753, 118 L. Ed. 2d 352 (1992) (Stevens, J., Dissenting).

The Due Process Clause of the Fifth Amendment is patently violated when a defendant has to stand trial on an indictment which is not returned by a fair and impartial grand jury.

Despite this, cases which have followed *Bank of*

Nova Scotia, supra, not only have cut back on the reach of the exception carved out by the Supreme Court, but have eliminated it.

While we recognize the necessity of approaching with care the delicate balance between the grand jury's independence and aggressive prosecution, as one commentator aptly put it ... "a court that dismisses a validly returned indictment is more guilty of interfering with the independence of the grand jury than a prosecutor who presents a slanted case to the grand jury." *Note. Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence,* 38 Wash. & Lee L. Rev. 110, 117 (1981).

Indeed the Court of Appeal's decision in the case at bar expressed what appeared to be sympathy for the district court judge:

> "We do not leave the subject, however, without stating our frustration. Every now and then a district judge is required to take an action which he is bound to know is borderline, but which must be taken or else he turns his courtroom over to the attorneys, in this case, the prosecutrix. This is such a case. The conduct of the prosecutrix before the grand jury in this case was without justification and the fact that we have not sustained the judgment of acquittal does not mean that we approve the conduct. Her seeming invitation to the grand jury to join the prosecution certainly is not worthy of approbation, and it certainly is no help to the office of the U.S. Attorney in which the conduct took place

> that this might well be an act which could be considered a part of a history of prosecutorial misconduct so as to raise a substantial and serious question about the fundamental fairness of the process which resulted in indictment in some future case. See *Bank of Nova Scotia,* 487 U.S. at 259." [APPENDIX EXHIBIT "A"]

As evidence of the necessity for this Court to clarify the *Bank of Nova Scotia, supra,* exception for cases in which the grand jury's independence is infringed, recent Fourth Circuit decisions do nothing to clarify the standards for indictment dismissal, and only add to the body of decisions repudiating the power of the courts to maintain any control over the prosecutor's conduct before the grand jury.

In *United States v. Burns,* 990 F. 2d 1426, 1436 (4th Cir. 1993), cert. denied ____ U.S. ____, 113 S. Ct. 2949, 124 L. Ed. 2d 696 (1993) the Court observed:

"[A]lthough it is true that the lower federal courts possess certain supervisory powers to control their own procedures in the interests of fundamental principles of liberty and justice, see *United States v. Williams,* 112 S. Ct. 1735, 1741 (1992) it is equally true that the Supreme Court never has fully explored the source of or the limitations on these powers. See *Sara S. Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts,* 84 Colum. L. Rev. 1433, 1433-34 (1984). The Court has made one principle quite clear, however; the supervisory power of the federal courts of appeals may

not be used to prescribe prosecutorial conduct 'in the first instance', before a grand jury." *Id.* at 1436.

From this that Circuit has concluded that because the grand jury is an institution separate from the Courts, over whose functioning the courts do not preside, no supervisory judicial authority exists with respect to its workings. It is submitted that this is not the intended result of *Bank of Nova Scotia, supra,* and indeed that it is a result inconsistent with our long history of preserving the integrity of the grand jury.

Similarly in *United States v. Mills,* 995 F. 2d 480 (4th Cir. 1993) cert. denied ____ U.S. ____, 114 S. Ct. 283, 126 L. Ed. 2d 233 (1993) the Fourth Circuit observed that "the Supreme Court's holdings under the Fifth Amendment's Indictment Clause teach that courts lack authority to review either the competency or sufficiency of evidence which forms the basis of an indictment and may not quash indictments when the errors which produce them, such as prosecutorial misconduct or violation of a statute, do not affect substantial rights." *Id.* at 490 (Citing *Bank of Nova Scotia, supra, Mechanik, supra, and Costello, supra.*

The Fourth Circuit's interpretation of *Bank of Nova Scotia, supra,* and its progeny pays lip service to the exception clearly carved out by the Supreme Court for cases in which the grand jury's independence is infringed, while ignoring it in practice.

The *Bank of Nova Scotia, supra* decision is explicit in adopting the standard articulated by Justice O'Connor in her concurring opinion in *United States v. Mechanik, supra* only where dismissal is sought for nonconstitutional

error. *Bank of Nova Scotia, supra* at 2374. Under this standard, dismissal of the indictment is appropriate only "if it is established that the violation substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that the decision to indict was free from the substantial influence of such violations. *United States v. Mechanik, supra* at 945-946.

The conclusion of *Bank of Nova Scotia, supra* that a district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant in fact is based on the fact that the violations which occurred were nonconstitutional and were unrelated to the grand jury's independence and decisionmaking process.

The clear implication to be derived therefrom is that where the misconduct violates the constitution, or where it substantially influences the grand jury's decision to indict, or where there is grave doubt that the decision to indict was free from the substantial influence of such violations, the indictment must be dismissed.

The instant case arguably meets all of three of the above criteria.

The Court is urged to find that the prosecution's statements to this grand jury did indeed effect a substantial right - the right to a fair and impartial jury as guaranteed by the Fifth Amendment to the United States Constitution.

To use an analogy - the very best writing - the books we can't put down - are those in which we are invited by the author to see ourselves. The writing which

appeals to us the most is that which draws us into it. That is precisely what the author of this prosecution did. By drawing the grand jurors into the perjury and importuning them to create the right atmosphere for its occurrence, she made them co-authors of a script which invited no deviation. Indeed, shortly after the witness' testimony when the prosecutrix suggested there was additional evidence the foreman echoed the sentiments of a grand jury eager to fulfill its mission when he said "would we be able to get it to the Judge?" The evidence in the case had become irrelevant - they were passing upon their own work product. The prejudice inherent in this cannot be denied. [Ct. of Appeals Appx. I, p.].

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that the guilty shall not escape nor the innocent suffer. He may prosecute with vigor - indeed he should do so. But while he may strike hard blows he is not at liberty to strike foul ones." *Berger v. United States,* 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 134 (1935).

The Court is respectfully urged to restore justice, not only in this case in which the defendant was deprived of his right to a fair and impartial grand jury, but in the

countless cases in which prosecutorial misconduct, for so long unchecked, has usurped the very function of the grand jury system.

CONCLUSION

Based upon the reasons aforesaid, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted:
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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ROLAND C. BRASWELL,
Defendant-Appellee.

No. 93-5770

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROLAND C. BRASWELL,
Defendant-Appellant.

No. 93-5813

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, District Judge.
(CR-92-101)

Argued: May 13, 1994

Decided: February 8, 1995

Before WIDENER and WILKINS, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by unpublished opinion. Judge Widener wrote the opinion, in which Judge Wilkins and Judge Ellis joined.

COUNSEL

ARGUED: John Samuel Bowler, Assistant United States Attorney, Raleigh, North Carolina, for Appellant. Diedra Lynn Whitted, Goldsboro, North Carolina, for Appellee. **ON BRIEF:** Janice McKenzie Cole, United States Attorney, Raleigh, North Carolina, for Appellant.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

WIDENER, Circuit Judge:

This is a troubling case. We must decide whether a district court should have granted a motion for judgment of acquittal to a defendant who has been the victim of prosecutorial misconduct before the grand jury. We answer that question in the negative in the circumstances of this case.

I

Appellant Roland C. Braswell was a Goldsboro, North Carolina attorney who stood accused of helping his clients conceal the profits from their illegal drug trafficking activity through the use of sham corporations and other devices. Two former clients, Canady and Riggs, each of whom had been convicted of drug trafficking crimes, were the main witnesses against him at trial as to the alleged conspiracy.

The perjury charges stemmed from Braswell's testimony before the same grand jury investigating the same case. In particular, Braswell testified about documents purporting to be the corporate records of the shell corporations he established for Canady and Riggs. Before the grand jury and at trial, the government presented witnesses who testified that the documents had been recently fabricated. These wit-

nesses based their conclusions on analyses of the dates of manufacture of the papers and on analyses of indentations on the papers.

The grand jury indicted Braswell on 16 counts. Count One charged conspiracy to defraud the United States by impeding the collection of tax in violation of 18 U.S.C. § 371; Counts Two through Seven each charged the misdemeanor crime of willful failure to file a tax return for each year between 1986 and 1991 in violation of 26 U.S.C. § 7203; Counts Eight through Fifteen each charged perjury for separate statements made before the grand jury, relating to the preparation of certain documents in violation of 18 U.S.C. § 1623; and Count Sixteen charged the crime of aiding or assisting the filing of a false tax return in violation of 26 U.S.C. § 7206.

On the morning of trial, Braswell pleaded guilty to the six misdemeanor charges (Counts Two through Seven). The trial on the remaining counts then proceeded. At the close of the government's case Braswell made a motion for judgment of acquittal. The district court granted the motion in part and dismissed Counts Nine through Fourteen (6 of the 8 perjury counts) as being duplicative of the same statement. The jury later found Braswell guilty of Counts One, Eight, and Fifteen (the conspiracy and two remaining perjury charges). The jury acquitted Braswell of Count 16 (aiding or assisting a false statement).

After trial, Braswell made another motion for judgment of acquittal on the conspiracy and two perjury convictions (Counts One, Eight and Fifteen) based upon misconduct of the prosecutrix before the grand jury. The district court granted the motion as to the two perjury convictions but denied it as to the conspiracy conviction because it found that there was ample evidence to support the conspiracy conviction. The government appealed the district court's grant of judgment of acquittal on the two perjury convictions,[1] and Braswell has appealed the failure of the district court to dismiss all of the indictment and on other grounds.

[1]The district court granted a motion for acquittal on the perjury counts. No distinction is made in the briefs between that and a motion to dismiss the indictment.

The Grand Jury Proceedings

The grand jury was in session on the morning of August 19, 1992, and a special Agent with the Internal Revenue Service, Terence O'Brien, was called to testify.[2] Agent O'Brien detailed the investigation of the drug traffickers Canady and Riggs and explained how Braswell had come to his attention. Agent O'Brien described several transactions that involved Braswell's efforts to help Canady and Riggs acquire possessions and property without attracting the attention of the IRS, including the purchase of a boat, the purchase of a farm, and an attempted purchase of a hotel. In addition, Braswell helped obtain a false Form 1099 (an income reporting form used for income tax) in an effort to help Riggs conceal even more of his income.

O'Brien then began to describe several meetings he or the United States Attorney's Office had with Braswell, as well as explanations Braswell offered for various incidents and acts. The Assistant United States Attorney guided Agent O'Brien through much of this testimony. Then the Assistant United States Attorney made the following remarks:

> Q: OKAY. DO YOU WANT TO GO NOW TO THE — TO THE SALE OF THE FARM AND THEN WE'LL GO INTO MR. BRASWELL'S EXPLANATIONS FOR ALL OF THIS?
>
> FOREPERSON: EXCUSE ME. DO WE NEED TO TAKE A BREAK?
>
> [THE PROSECUTRIX][3]: LET ME ASK YOU ONE—

[2]The Government gave the grand jury transcript to Braswell at trial after Agent O'Brien testified. Braswell then discovered, for the first time, what had occurred before the grand jury. Braswell was doubtless diligent.

[3]The prosecutrix did not appear on appeal either at argument or on the brief.

FOREPERSON: YEAH.

[THE PROSECUTRIX]: —ONE THING. MR. BRASWELL — WE'VE INVITED HIM TO APPEAR IN FRONT OF THE JURY. SO RIGHT NOW HE MAY BE OUTSIDE WITH HIS ATTORNEY, SO I'D ASK YOU NOT TO MAKE ANY COMMENTS ABOUT ANY OF THIS BECAUSE WE ANTICIPATE THAT MR. BRASWELL MAY PERJURE HIMSELF TODAY IN FRONT OF YOU, AND I WANT HIM TO — US TO HAVE A VERY FRIENDLY ATMOSPHERE IN HERE SO THAT HE FEELS VERY AT EASE IN GIVING HIS EXPLANATIONS FOR THIS TYPE OF THING. AND THEN WE MAY — WE'RE GOING TO HAVE ANOTHER WITNESS COME IN LATER WITH SOME OTHER INFORMATION. IS THERE ANYTHING YOU WANT TO SAY ABOUT THAT — SO I'D ASK YOU TO PLEASE NOT SAY A WORD, BECAUSE I ANTICIPATE THAT THEY'D BE OUT THERE RIGHT NOW.

Shortly after the grand jury proceedings resumed, Braswell testified about documents he had voluntarily turned over to the United States Attorney's office. Several of the documents were corporate record and minute books from the shell corporations set up for Canady and Riggs. Braswell's testimony indicated that he had made entries into these books on or about the dates written on the pages (*i.e.*, the years 1985 to 1988).

Following Braswell's testimony, a document examiner testified before the grand jury. The document examiner had tested the paper used in the documents turned over by Braswell and concluded that the paper dated from 1991. His indentation analysis also disclosed dates other than that shown on the face of the papers. When the grand jury returned the indictment four weeks later, on September 14, 1992, it included eight perjury charges resulting from Braswell's testimony before the grand jury.

II

Braswell raises several challenges to his conviction of conspiracy: (1) the prosecutor's conduct before the grand jury required the dismissal of the two perjury counts and the conspiracy count[4]; (2) the prosecutor and the district court erred in referring to the crime with which Braswell was charged as money laundering rather than conspiracy to defraud; (3) the jury should have been required to return a special verdict setting forth the overt acts it found in support of the conspiracy conviction; (4) the district court erred in sentencing Braswell under the United States Sentencing Guidelines without finding that an overt act was taken after the effective date of the Guidelines; and (5) the evidence of conspiracy or overt acts after the effective date of the Guidelines was insufficient to sustain the district court's decision to sentence under the Guidelines. The government asserts that the prosecutor's comments did not justify the dismissal of the two perjury counts. In light of our disposition of the case, we address with any particularity only two of the parties' contentions: the claim with respect to the prosecutrix's misconduct before the grand jury and whether the district court erred in not making a specific fact finding on whether an overt act had taken place after the effective date of the Sentencing Guidelines. The other assignments of error are without merit.

A

On the question of whether the district court's dismissal of Counts Eight and Fifteen can be sustained, the law is clear. In *United States v. Mechanik*, 475 U.S. 66 (1986), the Supreme Court reversed this circuit's decision to reverse that portion of a conviction which was tainted by the simultaneous presence and in-tandem testimony of two government witnesses before the grand jury. The Supreme Court

[4]Braswell makes this assertion in several subsections of his brief. We will consider his allegations in the aggregate. In addition, he argues that the entire indictment, including the misdemeanor tax charges to which he pleaded guilty, should have been dismissed. There is no evidence in the record that Braswell made a motion for judgment of acquittal with respect to the charges to which he pleaded guilty. We therefore do not address this contention and affirm his misdemeanor convictions.

assumed that the conduct in question violated Rule 6(d) of the Federal Rules of Criminal Procedure, but reasoned that the subsequent conviction by the petit jury rendered any error before the grand jury harmless. The Court relied, in part, on the societal costs of retrials when the error cannot be shown to be other than harmless. 475 U.S. at 72-73.

Following *Mechanik*, the Supreme Court decided *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), in which the Court held that a district court may not invoke its supervisory powers to avoid the harmless error analysis required under *Mechanik*. Absent a structural defect, see 487 U.S. at 257, which is not present here, a defendant who seeks to have a conviction vacated or an indictment dismissed because of misconduct before the grand jury must "'establish[ ] that the violation substantially influenced the grand jury's decision to indict' or [that] there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." 487 U.S. at 256 (quoting *Mechanik*, 475 U.S. at 76 (O'Connor, J. concurring)). Braswell is not able to make the required showing that the error was not harmless. There is no allegation of systemic and pervasive prosecutorial misconduct here that might allow a presumption of prejudice, 487 U.S. at 259, and the petit jury's verdict is conclusive on the propriety of the grand jury's decision to indict, 475 U.S. at 70.[5] In sum, although the prosecutrix may have helped the grand jury indict Braswell, the record does not show that her conduct substantially influenced the decision of the grand jury or placed such influence in grave doubt. 487 U.S. at 263.

We base our decision on *Mechanik* and *Bank of Nova Scotia*. In *Bank of Nova Scotia*, the Court considered the following findings of the district court and held that the indictment should not have been dismissed:

> We are left to consider only the District Court's findings that the prosecutors: (1) fashioned and administered unauthorized "oaths" to IRS agents in violation of Rule 6(c); (2) caused the same IRS agents to "summarize" evidence falsely

[5]Our decision on the perjury convictions applies equally to the conspiracy conviction.

> and to assert incorrectly that all the evidence summarized by them had been presented previously to the grand jury; (3) deliberately berated and mistreated an expert witness for the defense in the presence of some grand jurors; (4) abused its authority by providing "pocket immunity" to 23 grand jury witnesses; and (5) permitted IRS agents to appear in tandem to present evidence to the grand jury in violation of Rule 6(d).

487 U.S. at 260.

The conduct of the prosecutrix here was lacking, but we cannot say that it was enough to justify legally the dismissal of the indictment in the face of the holding that the conduct of the prosecutors above described in *Bank of Nova Scotia* was not. Accordingly, the judgment of acquittal on Counts Eight and Fifteen must be reversed. It follows that the denial of the motion for judgment of acquittal on Count One must be affirmed since the defendant's appeal on that count on the same question rested on the same conduct.

We do not leave the subject, however, without stating our frustration. Every now and then a district judge is required to take an action which he is bound to know is borderline, but which must be taken or else he turns his courtroom over to the attorneys, in this case, the prosecutrix. This is such a case. The conduct of the prosecutrix before the grand jury in this case was without justification and the fact that we have not sustained the judgment of acquittal does not mean that we approve the conduct. Her seeming invitation to the grand jury to join the prosecution certainly is not worthy of approbation, and it certainly is no help to the office of the U. S. Attorney in which the conduct took place that this might well be an act which could be considered a part of a history of prosecutorial misconduct so as to raise a substantial and serious question about the fundamental fairness of the process which resulted in indictment in some future case. See *Bank of Nova Scotia*, 487 U.S. at 259.

Although our sympathies may be, and are, with the district judge in this case, we are required to and we do reverse the judgment of acquittal on Counts Eight and Fifteen.

III

At sentencing, the district court stated, over Braswell's objection, that because the indictment charged a time period for the conspiracy that extended past the effective date of the Guidelines, there was no need to find the existence of an overt act occurring past that date in order to sentence the defendant pursuant to the Guidelines. This is in conflict with our decisions. See, e.g., *United States v. Bakker*, 925 F.2d 728, 739 (4th Cir. 1991). Although it appears to us that there may well be enough evidence in the record to justify the finding of the existence of an overt act or acts after the effective date of the Guidelines, in light of our decision with respect to Counts Eight and Fifteen, the case must be remanded for resentencing and the sentences imposed on all counts of the indictment must be vacated. At sentencing, the district court will address any argument about overt acts past the effective date of the Guidelines as well as any other matter pertinent to that proceeding.

Accordingly, we vacate Braswell's sentences and the district court's grant of judgment of acquittal on Counts Eight and Fifteen, and remand for reinstatement of the convictions and resentencing.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES
DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH

No. 92-101-01-CR-5-BO

UNITED STATES OF AMERICA	)	
	)	
v.	)	ORDER
	)	
ROLAND C. BRASWELL,	)	
Defendant.	)	

The defendant was convicted by a jury of conspiracy to launder funds in connection with drug trafficking and two counts of perjury before the federal grand jury. The defendant is an attorney. The evidence at trial was that certain confessed drug dealers employed the defendant to handle business transactions for them. Their purpose was to convert drug proceeds into legitimate investments. The defendant was charged in 16 counts of an indictment. Eight of these counts arose out of alleged perjury before the grand jury during the defendant's testimony before that body. Six counts charged failure to file federal income tax returns. One count charged the conspiracy and, finally, the defendant was charged with aiding and abetting in the preparation of a false income tax return.

At trial the court dismissed six of the eight perjury counts as being duplicative of the same statement. The defendant was found not guilty by the jury on the charge of aiding and abetting in the preparation of a false income tax return. The defendant pled guilty to the six counts of

failure to file federal income tax returns. The defendant was found guilty by the jury of the conspiracy charge.

The defendant now moves for a judgment of acquittal on the three counts, Count 1, Count 8, and Count 15, on which he was convicted.

Discussion

The court denies the motion for judgment of acquittal on Count 1, the charge of conspiracy, but allows the judgment of acquittal on Counts 8 and 15, the two perjury convictions.

As a part of the government's investigation into the financial activities of Richard Riggs and James Canady, persons involved in drug trafficking activity, the prosecution investigated their financial transactions including the establishment of Coastal Innovations, Inc., a North Carolina corporation. The defendant Braswell was their attorney in connection with this business. The defendant was asked to produce the corporate minute book of Coastal Innovations, Inc. for the years 1985 through 1988. The defendant was counsel to this business and served as its Assistant Secretary. After obtaining the corporate minute book, the government performed chemical tests and other forensic examinations to determine the date of the manufacture of the paper used in portions of the book. It was scientifically determined that the paper was made after January, 1992. Certain entries in the minute book indicated that they had been made in May, 1985, almost seven years prior to the existence of the paper. The government concluded that the corporate records had been fabricated and produced in response to its investigation of suspected money

laundering through this corporation.

The government invited the defendant to testify before the grand jury. The defendant agreed and appeared during the grand jury consideration of this case. Just prior to the defendant's appearance on August 16, 1992, before the grand jury to give testimony regarding the corporate minute books, the grand jury heard from a special agent with the Internal Revenue Service who was the case agent handling the investigation. As the IRS agent's testimony ended, and prior to calling the defendant, the Assistant United States Attorney handling the case made the following statement to the grand jurors:

> Mr. Braswell -- we've invited him to appear in front of the Grand Jury. So right now he may be outside with his attorney, so I'd ask you not to make any comments about any of this because we anticipate that Mr. Braswell may perjure himself today in front of you, and I want him to -- us to have a very friendly atmosphere in here so that he feels very at ease in giving his explanations for this type of thing. And then we may -- we're going to have another witness come in later with some other information. Is there anything you want to say about that -- so I'd ask you to please not say a word, because I anticipate that they'd be out there right now. Thanks.

Following this statement, the defendant appeared and was questioned repeatedly regarding the entries in the corporate minute books and whether these were made in 1985 as indicated or were later fabricated in 1992 just

prior to producing the books. The defendant appeared to say that the entries were made at the time that they indicate, suggesting they were made in 1985, which could not be scientifically true. The defendant's responses were generally vague. He stated that his usual practice was to complete the minutes after a meeting or within a reasonable time of a meeting and that he did not recall making any minutes for the corporate book during 1991 or 1992.

Thereafter the grand jury returned the indictment charging him with perjury based on his testimony regarding the corporate records from 1985 through 1988.

The grand jury testimony by the special agent and the prosecutor's statements were produced as Jencks material after the agent's testimony at trial. It was only at that time that the defendant became aware of the prosecutor's statements before the grand jury and, thereafter, the defendant promptly made a motion to quash the indictment on the perjury counts and for judgment of acquittal based on the prejudicial statements of the Assistant United States Attorney before the grand jury.

The court deferred a ruling on this motion and submitted the case to the jury which returned guilty verdicts on the two perjury counts in question.

The court finds that under the circumstances of this case the prosecutor's statements to the grand jury were of such a prejudicial character that the indictments on the perjury charges should be dismissed and a judgment of acquittal should be entered on those charges. The statements by the prosecutor telling the grand jury that

they could expect the defendant, who was then only a witness, an either a subject or a target before the grand jury, to commit perjury when he later came before them, was an unnecessary and prejudicial suggestion to the grand jury which should not be allowed. In addition, the prosecutor's invitation to the grand jury to expect the defendant's perjury and therefore to make him feel comfortable and at ease thereby facilitating the perjury, invited the grand jury to become involved in the prosecution's activities and should not be allowed. A grand jury, just as a trial jury, should be neutral, impartial, and uncommitted to either side during the case. United States v. Williams, 112 S.Ct. 1735, 1742 (1992). It would be fundamentally unfair for grand jurors to become participants in the investigation or prosecution of a crime. In so doing they would lose their neutrality and would invite abuse. United States v. Mara, 410 U.S. 19, 29 (1973) (Douglas, J., dissenting).

With respect to the defendant's conviction of the charge of conspiracy, the court finds that there was ample evidence to support the jury's verdict and that charge should not be disturbed.

SO ORDERED this 4th day of August, 1993.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 7, 1995

No. 93-5770
CR-92-101

UNITED STATES OF AMERICA
Plaintiff-Appellant

v.

ROLAND C. BRASWELL
Defendant-Appellee

No. 93-5813
CR-92-101

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

ROLAND C. BRASWELL
Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellee/cross appellant's petition for rehearing

and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

ADDENDUM OF STATUTES, RULES, REGULATIONS OR OTHER AUTHORITIES

AMENDMENT V, UNITED STATES CONSTITUTION

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

DOCKET NO. 92-101-01-CR-5-BO

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	NOTICE
	)	OF
ROLAND CLIFTON BRASWELL Defendant	)	APPEAL

The name and address of the appellant is Roland C. Braswell P. O. Box 1357, Goldsboro, NC 27533.

The name and address of appellant's attorney is Roland C. Braswell, P.O. Box 1357, Goldsboro, NC 27533-1357, Phone - (919) 734-8002. Appellant will be appearing pro se.

OFFENSE CHARGED: (1) Conspiracy to defraud the United States - Title 18 USC Section 371 and (2) Did knowingly make false declaration under oath as set out in count Eight and count Fifteen of the Bill of Indictment - Title 18 USC 1623.

Defendant appeals from his conviction of perjury in Count Eight and count Fifteen which conviction was dismissed by the District Court, reinstated upon the government's appeal by the Fourth Circuit and remanded for sentencing which was done on April 10, 1995: For that the evidence was not sufficient to convict the defendant; the alleged perjury was not material and in its sentencing of the defendant, the District Court's application of the Federal Guidelines was erroneous.

Defendant appeals from the order entered April 10, 1995 wherein the Court held that conspiracy to defraud the United States count was a straddle conspiracy and sentencing would be under Federal guidelines and for that the District Court did not comply with the mandate of the decision of the United States Court of Appeals For the Fourth Circuit decided February 8, 1995.

Defendant appeals from the Order rendered against him and entered on April 10, 1995 wherein he was sentenced to imprisonment for a term of 27 months.

Defendant is presently at liberty under bond.

The above named defendant hereby appeals to the United States Court of Appeals For the Fourth Circuit from the above stated Order and Judgment and from each and every part thereof adverse to the appellant and the whole thereof does this defendant appeals.

This 19th day of April 1995.

Roland C. Braswell
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Supreme Court, U.S.
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(2)

No. 94-1981

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROLAND C. BRASWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the prosecutor's improper comment before the grand jury required petitioner's acquittal of the perjury charges against him.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	4, 5, 6, 7, 9
United States v. *Burns*, 990 F.2d 1426 (4th Cir.), cert. denied, 113 S. Ct. 2949 (1993)	8
United States v. *Hasting*, 461 U.S. 499 (1983)	8, 9
United States v. *Mechanik*, 475 U.S. 66 (1986)	4, 6
United States v. *Mills*, 995 F.2d 480 (4th Cir.), cert. denied, 114 S. Ct. 283 (1993)	8
United States v. *Payner*, 447 U.S. 727 (1980)	9
United States v. *Williams*, 504 U.S. 36 (1992)	8

Statutes and rule:

18 U.S.C. 371	2
18 U.S.C. 1623	2
26 U.S.C. 7203	2
Fed. R. Crim. P. 52(a)	5

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unpublished, but the judgment is noted at 46 F.3d 1127 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1995. A petition for rehearing was denied on March 7, 1995. Pet. App. 15a-16a. The petition for a writ of certiorari was filed on June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and two counts of perjury, in violation of 18 U.S.C. 1623. Petitioner also pleaded guilty to six counts of willful failure to file a tax return, in violation of 26 U.S.C. 7203. The district court granted petitioner's motion for a judgment of acquittal as to the two perjury convictions but denied the motion as to the conspiracy conviction. Petitioner was sentenced to 27 months' imprisonment. On cross-appeals, the court of appeals affirmed the conspiracy conviction, vacated the judgment of acquittal on the two perjury counts, vacated petitioner's sentence, and remanded for resentencing. Pet. App. 1a-9a.

1. Petitioner, an attorney, helped his clients conceal their drug-trafficking profits from the Internal Revenue Service by establishing sham corporations and other means. Pet. App. 2a. A federal grand jury returned an indictment charging him with defrauding the United States by impeding the collection of taxes. *Id.* at 3a. The indictment also charged that he perjured himself before the grand jury during its investigation of the tax fraud. *Ibid.*

The facts surrounding petitioner's grand jury testimony are as follows. Just before petitioner was to testify, the grand jury requested a five-minute break. Gov't C.A. Br. 15. The prosecutor asked the grand jurors not to discuss the proceedings during their break because petitioner might be outside the grand jury room with his attorney. Pet. App. 4a-5a; Gov't C.A. Br. 15. The prosecutor added that peti-

tioner might perjure himself before the grand jury and that the grand jurors should create a "very friendly atmosphere" to make him feel "at ease." Pet. App. 5a; Gov't C.A. Br. 15.

After the grand jury proceedings resumed, petitioner testified about the minute books of a corporation that he had used to launder drug proceeds. Gov't C.A. Br. 14; see also *id.* at 11-12. He repeatedly claimed that he had made entries in the corporate minute books on the dates between 1985 and 1988 specified in the books. Pet. App. 5a; Gov't C.A. Br. 14. Later expert testimony before the grand jury established, however, that the paper on which the entries were written was manufactured in 1991 or 1992. Pet. App. 5a; Gov't C.A. Br. 14-15. Four weeks later, after hearing additional testimony, the grand jury returned the instant indictment, which included eight perjury counts based on petitioner's grand jury testimony. Pet. App. 5a; Gov't C.A. Br. 16.

2. At petitioner's trial, two former clients convicted of drug trafficking testified that he helped them set up shell corporations to launder millions of dollars of drug-trafficking proceeds. Pet. App. 2a; Gov't C.A. Br. 9-12. Other witnesses testified that he lied to the grand jury about recently fabricated corporate records. Pet. App. 2a-3a.

At the end of the government's case, the district court dismissed six of the eight perjury counts against petitioner as duplicative. Pet. App. 3a. The jury convicted him on the two remaining perjury counts and the conspiracy count. *Ibid.*

After the trial, petitioner moved for a judgment of acquittal based on the prosecutor's comments to the

grand jury. Pet. App. 3a.[1] The district court granted the motion with respect to the two perjury convictions, but denied it with respect to the conspiracy conviction. *Id.* at 10a-14a. The court determined that the prosecutor's comment to the grand jury that petitioner might perjure himself was "unnecessary and prejudicial." *Id.* at 14a. It also found that the prosecutor's suggestion that the grand jurors make petitioner feel at ease invited them "to become involved in the prosecution's activities," instead of remaining neutral. *Ibid.* The court did not overturn petitioner's conspiracy conviction, however, because that conviction was supported by "ample evidence." *Ibid.*

3. The court of appeals affirmed the conspiracy conviction and reversed the judgment of acquittal on the perjury counts. Pet. App. 1a-9a.[2] It observed that, under *United States* v. *Mechanik*, 475 U.S. 66 (1986), and *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), "[a]bsent a structural defect, * * * a defendant who seeks to have a conviction vacated or an indictment dismissed because of misconduct before the grand jury must establish[] that the violation substantially influenced the grand jury's decision to indict or [that] there is grave doubt that the decision to indict was free from the substantial influence of such violations." Pet. App. 7a (internal quotation marks omitted). The court held that this case did not

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[1] The prosecutor's statements to the grand jury were given to petitioner at trial under the Jencks Act (Pet. App. 13a) but were not presented to the petit jury (Gov't C.A. Br. 16).

[2] In a ruling that is not at issue here, the court of appeals also vacated petitioner's sentence on the conspiracy count and remanded for resentencing. Pet. App. 9a.

involve a structural defect, and that "the record does not show that [the prosecutor's] conduct substantially influenced the decision of the grand jury or placed such influence in grave doubt." *Ibid.*

ARGUMENT

1. Petitioner contends that the prosecutor's misconduct before the grand jury was so egregious that it "allows a presumption that [he] was prejudiced." Pet. 11. Thus, according to petitioner, the court of appeals erred both by inquiring whether the misconduct caused actual prejudice and in holding that it did not. Pet. 14. The court of appeals was correct on both scores, however, and its decision does not conflict with any decision of this Court or another court of appeals.

In *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), this Court "h[e]ld that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Id.* at 254. The Court based that holding on Federal Rule of Criminal Procedure 52(a), which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *Bank of Nova Scotia*, 487 U.S. at 255 (quoting Rule 52(a)). The Court also held that, with "isolated exceptions," prejudice is to be determined on a case-by-case basis. 487 U.S. at 256. The exception is for cases "in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 257. The Court cited, as examples of presumptively prejudicial errors, racial and gender discrimination in the selection of grand jurors. *Ibid.*

The court of appeals correctly held that this case does not involve a presumptively prejudicial error in the grand jury proceedings. Pet. App. 7a. Contrary to petitioner's claim (Pet. 10-11), the prosecutor's conduct did not compromise "the structural protections of the grand jury" (*Bank of Nova Scotia*, 487 U.S. at 257). Indeed, the single episode of alleged misconduct involved in this case was far more mild than the pattern of prosecutorial conduct involved in *Bank of Nova Scotia*, which the Court held did not cause a presumptively prejudicial structural defect in the grand jury proceeding. See *id.* at 257, 260. Petitioner argues that, whereas the prosecutorial misconduct in *Bank of Nova Scotia* "concern[ed] matters of evidence *presented to a grand jury*," "the misconduct [in this case] goes beyond the evidence, and *involves the grand jury itself* in the misconduct." Pet. 14. That purported distinction is unsound, however, because petitioner did not show, and the courts below did not find, any misconduct on the part of the grand jurors. Instead, this case differs from *Bank of Nova Scotia* primarily in that the latter case involved numerous and varied instances of prosecutorial misconduct, whereas the present case involves only a single instance. Under *Bank of Nova Scotia*, that isolated incident was not presumptively prejudicial.

The court of appeals was also correct in holding that petitioner did not show that the prosecutor's misconduct caused actual prejudice. The jury verdict against petitioner on the perjury charges "mean[t] not only that there was probable cause to believe that [he was] guilty as charged, but also that [he was] in fact guilty as charged beyond a reasonable doubt." *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986). Petitioner does not dispute that there was ample

evidence at trial to support that verdict. Nor does he even dispute that the evidence before the grand jury established probable cause for the perjury charges. Thus, as the court of appeals concluded, petitioner did not "make the required showing" under *Bank of Nova Scotia*—*i.e.*, that the prosecutor's comments "substantially influenced the decision of the grand jury [to indict petitioner for perjury] or placed such influence in grave doubt." Pet. App. 7a; see *Bank of Nova Scotia*, 487 U.S. at 256.

Petitioner errs in contending that the standard adopted in *Bank of Nova Scotia*, 487 U.S. at 256, for determining actual prejudice was inappropriate here. Pet. 22-23. The Court in *Bank of Nova Scotia* described its standard as appropriate "at least where dismissal is sought for nonconstitutional error." 487 U.S. at 256. The Court did not suggest, however, that a different standard was appropriate for constitutional errors. In any event, the prosecutorial conduct at issue here was no more of constitutional dimension than was the prosecutorial conduct at issue in *Bank of Nova Scotia*. The court of appeals therefore properly applied the *Bank of Nova Scotia* standard, and, as petitioner concedes (Pet. 11), its decision to do so does not conflict with any other court of appeals decision.

2. Petitioner also contends that, even if the Constitution did not compel his acquittal on the perjury counts, that result was a proper exercise of the court's supervisory authority. Pet. 15-25. That contention does not warrant further review.

Petitioner asserts (Pet. 19) that this Court needs "to establish * * * with greater precision" the limits of the courts' supervisory authority over prosecutorial conduct before grand juries. Petitioner

does not contend that there is disagreement regarding those limits among the lower courts. Instead, he claims that review by this Court is necessary to correct "the body of decisions repudiating the power of the courts to maintain any control over the prosecutor's conduct before the grand jury." Pet. 21. Neither of the decisions he cites (Pet. 21-22) constitutes such a repudiation, however; each merely held that the use of supervisory authority was not warranted under the circumstances of that case. See *United States* v. *Mills*, 995 F.2d 480, 487-490 (4th Cir.) (rejecting defendant's claim that indictment should be dismissed because there was no evidence before the grand jury to support charges against him), cert. denied, 114 S. Ct. 283 (1993); *United States* v. *Burns*, 990 F.2d 1426, 1436 (4th Cir.) (refusing to dismiss charge in indictment that court determined was independent of other charges that government had agreed not to bring), cert. denied, 113 S. Ct. 2949 (1993).

Moreover, as the court of appeals observed, the relevant principles are "clear." Pet. App. 6a. In *United States* v. *Williams*, 504 U.S. 36 (1992), the Court made clear that courts generally may not use their supervisory authority "as a means of *prescribing* * * * standards of prosecutorial conduct in the first instance," *id.* at 47; instead, they generally may use that authority only for violations of preexisting legal standards of conduct, such as those prescribed by statute or the Federal Rules of Criminal Procedure, *id.* at 46-47; see also *United States* v. *Hasting*, 461 U.S. 499, 505 (1983). Moreover, *Bank of Nova Scotia* made clear that courts may use their supervisory authority to dismiss criminal charges based on prosecutorial misconduct before the

grand jury only when the misconduct is prejudicial. See 487 U.S. at 254; see also *Hasting*, 461 U.S. at 506; *United States* v. *Payner*, 447 U.S. 727, 736 n.8 (1980).

At bottom, petitioner's argument concerns, not the governing legal principles, but the court of appeals' application of those principles to this case. Thus, petitioner claims that this case "arguably meets" (Pet. 23) the criteria identified in *Bank of Nova Scotia* for an exercise of the court's supervisory authority, because, as a result of the prosecutor's asserted misconduct, the indictment was "not returned by a fair and impartial grand jury" (Pet. 19). The court of appeals disagreed, holding that the prosecutor's conduct did not substantially influence the grand jury's decision to indict. Pet. App. 7a. That factbound disagreement poses no issue worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1995